

STATE OF MICHIGAN
COURT OF APPEALS

MAXINE HANNERS, Personal Representative of
the Estate of CHARLES HANNERS, Deceased,

Plaintiff-Appellant,

v

SIVA SANKARAN, M.D., and MCLAREN
REGIONAL MEDICAL CENTER,

Defendants-Appellees.

UNPUBLISHED
August 7, 2007

No. 259535
Genesee Circuit Court
LC No. 03-077550-NH

CHERYL ZIMMERMAN, Personal
Representative of the Estate of CHARLES
HANNERS, Deceased,

Plaintiff-Appellant,

v

SIVA SANKARAN, M.D., and MCLAREN
REGIONAL MEDICAL CENTER,

Defendants-Appellees.

No. 261143
Genesee Circuit Court
LC No. 04-080228-NH

Before: Neff, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

In this consolidated medical malpractice action, plaintiffs appeal as of right the trial court's orders granting summary disposition in favor of defendants under MCR 2.116(C)(7). We affirm.

I. Background Facts

On February 3, 2000, decedent 68 year-old Charles Hanners was admitted to defendant McLaren Regional Medical Center, and was treated by defendant Dr. Siva Sankaran for treatment of renal insufficiency, congestive heart failure, and ascites. On February 4 and 8, decedent underwent abdominal paracentesis to obtain cultures for analysis. On February 13,

decedent was discharged. On February 15, a microbiology report revealed the presence of bacteroides, but treatment was not initiated. On February 28, decedent was readmitted, and was discharged on March 3, without treatment for the bacteroides revealed in the February 15 report. On March 16, decedent was again readmitted, this time with an abdominal abscess and sepsis. His condition worsened, and decedent died on April 6 as a result of multiple organ failure and overwhelming sepsis.

On May 11, 2001, plaintiff Maxine Hanners was named personal representative of Charles Hanners' estate, and letters of authority were issued. On May 6, 2003, Hanners filed her notice of intent to sue. On October 17, 2003, Hanners filed a medical malpractice wrongful death action.

Defendants moved for summary disposition under MCR 2.116(C)(7), asserting that Hanners' complaint was time barred under our Supreme Court's decision in *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004). Specifically, defendants sought summary disposition on the basis that the two year statute of limitations applicable to medical malpractice actions (MCL 600.5805) expired on March 3, 2002 (two years from the last date the claims can be alleged to have accrued), and that the complaint filed on October 17, 2003 was untimely. Hanners argued that her complaint was timely because of the wrongful death savings provision, MCL 600.5852, or, in the alternative, if the trial court accepted defendants' argument, it should not retroactively apply the two year statute of limitations applicable to medical malpractice actions.

On September 24, 2004, the trial court granted summary disposition in favor of defendants, holding that under *Waltz*, because plaintiff's complaint was not filed within two years after the letters of authority were issued and the filing of the notice of intent did not toll that time period, the complaint was untimely and was barred by the statute of limitations. Hanners moved for reconsideration, which the trial court denied. Hanners appeals as of right the trial court's grant of summary disposition in favor of defendants, arguing that her claim was not time barred.

After summary disposition was granted to defendants, on November 5, 2004, plaintiff Cheryl Zimmerman was named as successor personal representative of Charles Hanners' estate, and new letters of authority were issued. On November 12, 2004, Zimmerman filed a second medical malpractice wrongful death action. Defendants moved for summary disposition under MCR 2.116(C)(7) on the grounds that Zimmerman's case was barred by *res judicata* because of the previously decided Hanners case.

The trial court granted summary disposition with prejudice in favor of defendants holding that the claim was barred by *res judicata*. Specifically, the trial court found that Charles Hanners' estate could not avoid the dismissal of the earlier lawsuit simply by filing a claim under a different personal representative. The trial court found that the earlier action was decided on the merits, i.e., that the claim was time-barred; the matter contested in this action was or could have been resolved in the earlier action; and that both actions involved the same parties. The trial court specifically noted that the party in interest is the estate of Charles Hanners, and not whoever might be named personal representative, be it Maxine Hanners or Cheryl Zimmerman. Zimmerman moved for reconsideration, and the trial court denied the motion.

Zimmerman appeals as of right the trial court's grant of summary disposition in favor of defendants, arguing that the wrongful death savings provision, MCL 600.5852 does not apply to her case because she was named as a new personal representative and new letters of authority were issued.

II. Standard of Review

We review de novo decisions regarding summary disposition motions. *Waltz, supra* at 647. Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by the statute of limitations. *Id.* In determining whether summary disposition was properly granted under MCR 2.116(C)(7), we consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them. *Id.* at 647-648.

III. Docket No. 259535

This Court's recent decisions in *Mullins v St. Joseph Mercy Hosp*, 271 Mich App 503; 722 NW2d 666 (2006) and *Ward v Siano*, 272 Mich App 715; 730 NW2d 1 (2006) are dispositive of the issues asserted by plaintiff Hanners.

MCL 600.5805(6) generally provides that a plaintiff in a medical malpractice action must bring a claim within two years after the claim accrued. Notwithstanding that limitation, for wrongful death actions such as this one, MCL 600.5852 allows a personal representative two years from the issuance of letters of authority to file a medical malpractice claim, so long as the claim is filed within three years after the limitations period has run. Hanners claims that, while she did not file the first action within two years after the letters of authority were issued, the running of that time period was tolled by MCL 600.5856(c) because she filed a notice of intent under MCL 600.2912b. However, in *Waltz, supra* at 648-655, our Supreme Court held that the filing of a notice of intent does not toll the wrongful death saving period in MCL 600.5852, and *Waltz* applies retroactively. *Mullins, supra* at 507-510.

The alleged malpractice in this case occurred on March 3, 2000. Plaintiff Hanners was issued letters of authority appointing her personal representative of Charles Hanners' estate on May 11, 2001. As a result, she had two years to commence a wrongful death action under MCL 600.5852, by May 11, 2003. That period was not extended by her filing a notice of intent on May 6, 2003. As a result, the complaint filed on October 17, 2003 was time-barred. Because Hanners' claim was filed after the two-year malpractice limitations period expired, and because no exception applied, the trial court properly granted summary disposition in favor of defendants.

Plaintiff Hanners argues that, notwithstanding *Waltz*, her claim should not be barred under principles of judicial tolling. However, the principles of judicial tolling do not apply here, *Ward, supra*, and the trial court properly granted summary disposition to defendants in the first malpractice action.

IV. Docket No. 261143

With respect to the second action filed here, plaintiff Zimmerman relies primarily on *Eggleston v Bio-Med Applications of Detroit*, 468 Mich 29; 658 NW2d 139 (2003). There, our Supreme Court considered whether a successor personal representative had two years after appointment to file an action on behalf of an estate under the wrongful death saving statute where the initial personal representative died before a complaint was filed. The Court concluded that the plain language of the statute “clearly allow[ed] an action to be brought within two years after letters of authority are issued to the personal representative.” *Id.* at 33. Because the successor personal representative filed the complaint within two years after letters of authority were issued and within three years after the period of limitations had run, the action was timely under MCL 600.5852. *Id.*

Notwithstanding *Eggleston*, however, the complaint filed by the initial personal representative here was dismissed on statute of limitations grounds. That dismissal was an adjudication on the merits and *res judicata* bars the successor personal representative from bringing another action against defendants. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412; 733 NW2d 755, 758 (2007).

We affirm.

/s/ Henry William Saad

/s/ Richard A. Bandstra

I concur in result only.

/s/ Janet T. Neff